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Likewise, where the tax was placed upon the corporate property, such as cars travelling in and out of the state, and such number of all the company's cars was taxed as the mileage in the state bore to the total mileage, the court found that the property was arbitrarily valued too high and held the tax invalid.¹⁰ So with a tax based upon the gross receipts and measured by the proportion that the business done in the state bears to the entire business.¹¹ But a tax upon gross receipts from business done in the state has been upheld when it was in lieu of all other taxes, thus distinguishing it from the case last cited.¹² Taxes upon the net income of non-residents derived from all property or business carried on within the state have been sustained recently.¹³ Thus it appears that state taxation will be sustained when a bona fide attempt to estimate the "true value" or allocate the property has been made and a just result reached. No distinction has been made between a tax based upon capital stock, gross receipts, net income, gross business, or tangible corporate property when properly apportioned. Nor is there ground for distinction between a tax which is in effect an excise tax and a tax upon corporate property, although the court would seem to be more inclined to uphold the latter.¹⁴ Each case stands on its own merits as to justice in the result. The court's decision in the principle case, sustaining the tax on the ground that though most of the income was received outside Connecticut it was received from manufacture in Connecticut, is in harmony with principles previously announced.¹⁵

A MERE QUANTUM MERUIT FOR ATTORNEYS' FEES.

It may be true, in this country at least, that a lawyer is worthy of his hire, but this does not mean that he is always to get what he thinks

value. The company had no terminals in that state and its road bed was constructed across plains at much smaller expense than in other states where the nature of the country and the size and number of the cities made railroad building more costly. See *Fargo v. Hart* (1904) 193 U. S. 490, 24 Sup. Ct. 498.

¹⁰ *Union Tank Line v. Wright* (1919) 249 U. S. 275, 39 Sup. Ct. 276. See COMMENTS (1919) 28 YALE LAW JOURNAL, 802.

¹¹ *Meyer v. Wells Fargo and Co.* (1912) 223 U. S. 298, 32 Sup. Ct. 218.

¹² *U. S. Express Co. v. Minn.* (1912) 223 U. S. 335, 32 Sup. Ct. 211. Likewise taxing gross earnings from car lines operated in the state, in lieu of all other taxes, has been held constitutional. *Cudahy Packing Co. v. Minn.* (1918) 246 U. S. 450, 38 Sup. Ct. 373.

¹³ *Travis v. Yale Towne Mfg. Co.* (1920, U. S.) 40 Sup. Ct. 228; *Shaffer v. Carter* (1920, U. S., 40 Sup. Ct. 221; see *Deganay v. Lederer* (1919) 250 U. S. 376, 39 Sup. Ct. 524.

¹⁴ See *U. S. Express Co. v. Minn.* (1912) 223 U. S. 335, 344 ff., 32 Sup. Ct. 211, 214 ff.

¹⁵ For a more complete discussion of this subject with the authorities collected see Powell, *Indirect Encroachment of Federal Authority by the Taxing Powers of the States* (1917-18) 31 HARV. L. REV. 321, 572, 721, 932; (1918-19) 32 *id.* 234, 374, 634, 902.

his hire should be. He may recover in *quantum meruit* the "reasonable value" of his services practically everywhere in the United States,¹ but a series of recent cases has shown that there may nevertheless be obstacles in his way of recovering a definite and agreed fee. If such fee is contingent, it is, according to the Canons of Legal Ethics of the American Bar Association, subject to the supervision of the court, in order that the client may be protected from unjust charges.² Except for this, the fee when fairly agreed upon is recoverable by a lawyer who has completed the promised service.³ If the lawyer is in default, he may by the better rule recover nothing.⁴ If, however, he is ready and willing to perform but is wrongfully discharged by his client, a conflict of authority has developed. Probably the majority of cases allow him in such case to recover his agreed fee,⁵ but the minority dissent has been reinforced by strong decisions in New York⁶ in

¹ *Newman v. Washington* (1827, Tenn.) Mart. & Y. 79; Costigan, *Cases on Legal Ethics* (1917) 484; *Adams v. Stevens* (1841, N. Y.) 26 Wend. 451. In New Jersey an express promise of a fee is necessary. *Bentley v. Fidelity & Deposit Co.* (1908) 75 N. J. L. 828, 89 Atl. 202, 127 Am. St. Rep. 841, note. See also cases collected 6 C. J. 719; 1 Thornton, *Attorneys at Law* (1914) secs. 414, 487. As to the English rule *contra*, see note 19 *infra*. This was the early rule in Pennsylvania, *Mooney v. Lloyd* (1819, Pa.) 5 S. & R. 412, later overruled in *Foster v. Jack* (1835, Pa.) 4 Watts, 334.

² Canon 13. The Canons of Ethics are reprinted in each volume of Am. Bar. Assn. Reports since Vol. 33 (except Vols. 35 and 36), also in Costigan, *op. cit.*, at p. 570. While these canons are not statutes, they are given much weight in such proceedings as those for the disciplining of lawyers: *In re Morrison* (1920, S. D.) 178 N. W. 732; *People v. Berezniak* (1920) 292 Ill. 305, 127 N. E. 36; (1920) 5 MINN. L. REV. 71. Courts have refused to enforce unconscionable contingent fee contracts, but they hesitate to base such action on the size of the fee alone. *Taylor v. Bemiss* (1884) 110 U. S. 42, 3 Sup. Ct. 441; 6 C. J. 741. The Canons of Ethics seem not to have affected the situation. *Ridge v. Healy* (1918, C. C. A. 8th) 251 Fed. 798, 804; *In re D'Adamo's Estate* (1916, Surro.) 94 Misc. 1, 157 N. Y. Supp. 374; *In re Meng* (1919) 227 N. Y. 264, 125 N. E. 500.

³ See references to cases collected in note 1 *supra*.

⁴ Cases collected 6 C. J. 726; Thornton, *op. cit.*, sec. 450; see also *Mills v. Metropolitan St. Ry.* (1920, Mo.) 221 S. W. 1.

⁵ *Dorshimer v. Herndon* (1915) 98 Neb. 421, 153 N. W. 496; *Scheinesohn v. Lemonek* (1911) 84 Oh. St. 424, 95 N. E. 913, Ann. Cas. 1912 C, 737, note. See also cases collected L. R. 1917 F, 406; 6 C. J. 734.

⁶ *Martin v. Camp* (1916) 219 N. Y. 170, 114 N. E. 46, L. R. A. 1917F, 402, note, reversing (1914) 161 App. Div. 610, 146 N. Y. Supp. 1041. See criticism by W. A. Estrich, *Right to Discharge an Attorney* (1918) 25 CASE AND COMMENT, 563; (1916) 30 HARV. L. REV. 183; 2 Williston, *Contracts* (1920) sec. 1029. Cf. (1916) 26 YALE LAW JOURNAL, 153. The decision in the lower court was approved in (1914) 28 HARV. L. REV. 101 and (1914) 14 COL. L. REV. 597. Earlier cases in accord with *Martin v. Camp* are *Louque v. Dejan* (1911) 129 La. 519, 56 So. 427, 38 L. R. A. (N. S.) 389, note; *Polsley v. Anderson* (1874) 7 W. Va. 202; *Western Union Tel. Co. v. Semmes* (1890) 73 Md. 9, 20 Atl. 127; *Parish v. McGowan* (1912) 39 App. D. C. 184 (discharge before substantial compliance). Cf. also *Henry v. Vance* (1901) 111 Ky. 72, 63 S. W. 273. As

1916 and in Minnesota⁷ and South Dakota⁸ in 1920. Oregon, however, has recently decided with the majority without noting the opposing rule.⁹ The theory of what may perhaps be termed the New York rule, in view of the general resort to *Martin v. Camp*¹⁰ as authority, is that since the client has the "right" to discharge the lawyer at any time, the exercise of that "right" is not to be followed by the same duty of paying the agreed fee as though it had not been exercised.

It is proposed to examine this viewpoint, particularly since it has been the subject of rather general criticism.¹¹ It may be admitted at once that the onus is on those who support this rule to justify it on some compelling reasons of policy, since it is at variance with the ordinary rule of agency or employment.¹² Do such reasons of policy exist?

the above cases show, this result seems more easily reached where the contract is for a contingent fee, 6 C. J. 725. See *Ramey v. Graves* (1920, Wash.) 191 Pac. 801. In *Ennis v. Beers* (1911) 84 Conn. 610, 80 Atl. 772, only *quantum meruit* was allowed against a minor.

⁷ *Lawler v. Dunn* (1920, Minn.) 176 N. W. 989, two judges dissenting; see criticism, (1920) 4 MINN. L. REV. 441, (1920) 20 COL. L. REV. 729.

⁸ *Ritz v. Carpenter* (1920, S. D.) 178 N. W. 877. *Ramey v. Graves*, *supra* note 6, in accord, is rested upon the ground that the contract was for a contingent fee.

⁹ *Dolph v. Speckart* (1920, Ore.) 186 Pac. 32. A note on this case in (1920) 20 COL. L. REV. 485 discusses another point. See also *Teiser v. Barlow* (1920, Ore.) 192 Pac. 394, *Allen v. Brooke* (1920, Ga.) 102 S. E. 832, and dictum in accord in *Mills v. Metropolitan St. Ry.*, *supra* note 4, at p. 5.

¹⁰ *Supra* note 6.

¹¹ See notes 6 and 7 *supra*.

¹² Though an attorney is an officer of the court, as between him and his client the general rules of agent and principal apply. 1 Mechem, *Law of Agency* (2d ed. 1914) sec. 2150. In the ordinary contract of employment, an employee wrongfully discharged recovers his damages based upon the contract price less such damages as he might have reasonably avoided. Williston, *Contracts* (1920) secs. 1028, 1358 ff. That the rule as to minimizing damages does not ordinarily apply to attorneys who have not contracted to give a definite portion of their time, see *Dixon v. Volunteer Bank* (1913) 213 Mass. 345, 100 N. E. 655; 6 C. J. 725. It is submitted that Professor Williston's criticism of *Martin v. Camp*, *supra* note 6—"It is a fundamental principle of contracts that both parties must be bound by the agreement"—states merely the logical rule to be applied in the absence of any countervailing policy. He himself states one exception—voidable promises—which is a much more inclusive class than the example he suggests of minors, and he himself points out that relations between attorney and client are subject to careful scrutiny, with the burden upon the attorney to show the fairness of any dealings with his client. Williston, *op. cit.*, secs. 1029, 1627. Even though he limits this rule to dealings after the relation of attorney and client exists, he shows that his "fundamental" rule has some gaps. Moreover, it is suggested that the same factors of more extensive knowledge or means of knowledge on the attorney's part and confidence on the client's part, at least to some extent exist at the formation of the relation, so that it, too, should be subject to some scrutiny. The statements in cases like *Elmore v. Johnson* (1892) 143 Ill. 513, 32 N. E. 413, that then the parties deal with each other at arm's length seems too broad. Even from the standpoint of logic alone it would seem that courts have power to control their own officers.

On these points the courts in the recent cases might well have been more definite. They speak of an implied or inferred condition of the contract and then rely upon the "right" of discharge, which does suggest the policy involved, but, as the criticisms show, with not enough clearness to convince.¹³ Any person has the power "to break his contract," i. e., to change the form of his duty to the plaintiff from one based upon his promise to one based upon the remedial action of the court. Where the courts will order specific performance, this new duty is not essentially different from his original duty, except that it is more serious by reason of costs and damages. As courts will not attempt to enforce specifically contracts of personal service,¹⁴ it would follow that in any such contract a party has power to substitute money damages for performance. What the courts are really interested in here is whether the termination is privileged, i. e., whether no duty to pay damages as for a wrongful discharge will be enforced by the courts.¹⁵

It is stated by countless authorities as well settled that a client has the "right" to discharge his attorney and to substitute another at any time with or without cause and in spite of any contract. The reason of policy assigned is the necessity inherent in the relationship of absolute confidence of the client in his attorney; when such confidence ends, the relationship should end.¹⁶ But under the majority rule above stated, the courts say that a discharge without cause amounts to a breach of contract, and the damages are measured by the contract price.¹⁷ Hence the discharge of the lawyer, unless for justifiable cause, would not be a defense to an action for the contract price. It is difficult to see what is the practical utility of the "right" of substitu-

¹³ See criticism of these cases on this point (1920) 29 YALE LAW JOURNAL, 921. The flamboyant language in *Ritz v. Carpenter*, *supra* note 8, is subject to the same criticism.

¹⁴ It has been held that there is no room for the application of the rule of *Lumley v. Wagner* (1852, Ch.) 1 DeG. M. & G. 604, to a discharge by an employer, and probably it is not applicable in any event to a contract for legal services. See Pomeroy, *Equity Jurisprudence* (4th ed. 1919) secs. 1712, 1713.

¹⁵ See on this point *Estrich*, *op. cit.* note 6.

¹⁶ "Indeed, the right of a client so to discharge his attorney is practically indispensable in view of the delicate and confidential relations which exist between attorney and client, and of evil to the client's interests, engendered by friction or distrust." Thornton, *op. cit.*, sec. 138, with cases collected. See also 6 C. J. 676; cases in note 18 *infra*. So also, as the client must have full control of his case, an agreement that a suit should not be settled without the attorney's consent is void as against public policy. *Matter of Snyder* (1907) 190 N. Y. 66, 82 N. E. 742, 14 L. R. A. (N. S.) 1101, note, 13 Ann. Cas. 441, note. See also Ann. Cas. 1913 D 306, note; 3 A. L. R. 472; *Moran v. Simpson* (1919, N. D.) 173 N. W. 769; *Simon v. Chicago etc. Ry.* (1920, N. D.) 177 N. W. 107, overruling *Greenleaf v. Minneapolis etc. Ry.* (1915) 30 N. D. 112, 151 N. W. 879. The same policy is expressed by the cases holding that a testator cannot force his executors to employ a particular attorney in settling his estate. *Foster v. Elsley* (1881) 19 Ch. D. 518; (1915) 28 HARV. L. REV. 530.

¹⁷ See note 5 *supra*.

tion universally so carefully cherished by the courts, if the client is no better off than any party to a contract of personal service who desires to terminate it. If a client must show legal cause in each case before discharging his attorney or else pay the attorney whatever high fee may have been agreed upon as the price of success, then it is obvious that the relationship will continue after the client has ceased to have absolute confidence in "either the integrity or the judgment or the "capacity of the attorney."¹⁸ The New York rule is absolutely correct in treating the "right to discharge" as a barren power if the contract fee is nevertheless to be paid. If the New York rule is to be followed, in all honesty the courts should cease their talk about the nature of the relationship and its requirement of absolute confidence, since they are according nothing more than is inherent in any similar contract for services.

It is submitted further that independent rules of policy justify the New York rule. Under the English law a barrister may not recover a fee by suit.¹⁹ Only a solicitor may so sue.²⁰ It is then the ideal of the legal system from which our law springs that the counselor-at-law is not a hireling of the market, but is an officer of the court whose duty it is to see that justice is done and who receives from those whom he has protected such honorarium as their gratitude dictates.²¹ Such an ideal may easily degenerate into a cloak for hypocrisy,²² and yet, as many of our greatest lawyers have pointed out, there is something fine in holding as an ideal of the profession the ministry of justice rather than the making of money.²³ In spite of sneers and jibes, we know that the best lawyers in the country to-day faithfully serve such an ideal. We may go further and say that none but the poorest grade of lawyer will sue for a fee except in case of great imposition.²⁴ The ordinary dispute as to fees is settled without court action.

¹⁸ Cf. *Gage v. Atwater* (1902) 136 Calif. 170, 172, 68 Pac. 581; *Henry v. Vance*, *supra* note 6; *Matter of Dunn* (1912) 205 N. Y. 398, 98 N. E. 914.

¹⁹ *Kennedy v. Broun* (1863, C. P.) 13 C. B. (N. S.) 677.

²⁰ *Poucher v. Norman* (1825, K. B.) 3 B. & C. 744.

²¹ The reasons of policy stated in *Kennedy v. Broun*, *supra*, have not met, however, with complete approval. See *Reg. v. Doutre* (1884, H. L.) L. R. 9 A. C. 745, 751; *McDougall v. Campbell* (1877) 41 U. C. Q. B. 332, 346, (Harrison, C. J. dissenting); *Christen v. Lacoste* (1893) 2 Que. Q. B. 142, 147, pointing out the similarity of the Roman, French, and English systems; 6 C. J. 718; Thornton, *op. cit.*, sec. 400 ff. But see Cohen, *The Law—Business or Profession?* (1919) 201 ff.

²² Cf. cases in note 21, *supra*.

²³ On the English system of fees see quotations from Joseph H. Choate and others collected in Costigan, *op. cit.* note 1, at p. 481 ff; Smith, *Justice and the Poor* (1919) 85, 86.

²⁴ See A. B. A. Canon 14: "Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients concerning fees should be resorted to only to prevent injustice, imposition or fraud."

We may well look askance at a rule of law which will ordinarily be resorted to only by the more offensive members of the bar.

A contract for an agreed fee by its very nature tends towards unfairness. Lawyers' fees are difficult enough to compute when all the items, such as time involved, amount involved, and the result of the litigation, are known. When substantially all factors of this kind are undetermined, naturally the lawyer—the one party to the relation who by his profession is familiar with the business in hand—will state a fee sufficiently high to cover all contingencies. In *Ritz v. Carpenter* (1920, S. D.) 178 N. W. 877, plaintiff had been employed to defend one accused of crime, and, according to his claim, after appearing at the preliminary hearing for \$250, agreed to appear at the trial for \$7,500.²⁵ Moreover the fact that here the factors upon which fees are ascertained are so uncertain will tend to foster contingent fee contracts, the extortion and oppression of which have often been discussed.²⁶ In many of the cases adopting the New York rule, the same result could have been reached by applying the provision of the Canons of Ethics that the court should supervise contingent fees.²⁷ The provision has not been as successful as might have been hoped,²⁸ and hence it is wise that the courts have directly and conclusively taken control of this particular problem.

The rule allowing only *quantum meruit* does not operate unfairly to the attorney in actual practice, as anyone who has attempted to contest attorneys' fees can testify. The attorney has all the advantages in securing evidence to prove his case in any claim for the reasonable value of his services, and the court or jury can be relied on to take care of manifest unfairness upon the part of the client. If, as stated in *Ritz v. Carpenter*, the jury may consider the agreed fee in determining what would be such reasonable value, the lawyer is fully protected.

The New York rule has been stated not to apply to cases where the attorney "has changed his position or incurred expense" or "is employed under a general retaining fee for a fixed period to perform legal services." It is submitted that the first exception is useless and should be forgotten. An attorney has always changed his position by merely accepting the employment, since he cannot thereafter be employed on the opposite side. The second exception, a contract for a fixed period, seems to be generally approved²⁹ and has recently been followed by the New York Court of Appeals in *Greenburg v. Remick*

²⁵ He explained his high charge for the trial on the ground of the ignominy his appearing in defense of such a crime might bring on himself. But he had already appeared at the preliminary hearing for the smaller sum.

²⁶ See citations in (1920) 30 YALE LAW JOURNAL, 82.

²⁷ Note 2, *supra*.

²⁸ Cohen, *op. cit.* note 21, at p. 207. See also note 2, *supra*.

²⁹ *Horn v. Western Land Assn.* (1875) 22 Minn. 233; *Dixon v. Volunteer Bank*, *supra* note 12; cases collected L. R. A. 1917 E. 406, note.

& Co. (1920, N. Y.) 129 N. E. 211, reversing the judgment of the appellate division³⁰ which had sustained a demurrer to an attorney's complaint for breach of contract for yearly employment.³¹ Logically the case is similar to that of employment for a particular case, but practically the reasons of policy are not so strong. Both parties are able in advance to make a fairer estimate of the value of the services for the fixed period than is possible where the amount of services to be rendered is wholly indefinite, and one who has sufficient law business to employ an attorney regularly is probably sufficiently informed as to its character to avoid imposition. It would not have been undesirable for the court to assume control of this class of fees, though in view of the difference in situation, probably it cannot reasonably be criticised for failure to do so.

It is obvious that one's answer to the questions here involved will turn upon the background of his own experience and the point of view with which he approaches the problem. If his experience has been (as it is suggested is the more general experience) that comparatively few clients are able to impose upon lawyers, while unfortunately the converse is not true, his views will accord with those expressed in *Martin v. Camp*. And they will be more strongly fortified if his point of view is not that of the lawyer trying to make a living, but is that of one seeking the general welfare of the community, which needs urgently men of exceptional character as its "officers of the court." It is unfortunate that such welfare may not coincide with the needs of the young man with his way to make. Perhaps to some the answer may seem harsh, but it is nevertheless sound that unless he wishes to accommodate himself to the high standards of the profession necessary to the general welfare, he should employ his time and talents in other fields.³²

C. E. C.

³⁰ (1920) 191 App. Div. 947, 182 N. Y. Supp. 229.

³¹ The court repeats the unfortunate statement in *Martin v. Camp*, *supra* note 6, that "the right to discharge" the attorney is an implied condition of the contract, and then adds, "unless expressly or otherwise negated." This last is against all authority, particularly in New York. See notes 16 and 18, *supra*. The implication is one of law, not of fact. This shows the danger of failing to recognize that an implication or presumption of law means simply that whatever is to be so implied or presumed—here the fact of an agreement—is no longer a necessary operative fact in the legal situation under consideration. Cf. (1920) 29 YALE LAW JOURNAL, 921.

³² Cf. Cohen, *op. cit.* note 21, at p. 214.